HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

OWP No.634/2006 a/w CMP Nos. 820/2006 & 864/2006

Hon'ble Mr. Justice J.P. Singh

M/S Hemkund Transport Service, Jammu
Versus
Union of India through its Secretary, Ministry of Consumer Affairs, New Delhi, and seven others.

Decided On : 29.09.2006.

Sh. U. K. Jalali, Sr. Advocate, with Sh. Anil Khajuria, Advocate for the Petitioner.
Sh. M. A. Goni, Sr. Advocate, with Sh. Ajay Kumar Gandotra, Advocate for the Respondents.

JUDGEMENT

Background facts

1. Food Corporation of India, Regional Office, Jammu, issued an Emergent Notice under No. Stg.32(3)/JK/Tender/05-06/1793 dated 29.07.2006 inviting **on the spot offers** from financially sound parties having sound business competence and fulfilling eligibility requirements as per Model Tender Form (MTF) clauses for appointment of Road Transport Contractor on day-to-day basis, to be opened on 01.08.2006 at 12.00 noon.

Complete failure of State Road Transport Corporation to supply required number of trucks to carry food grains to various parts of the State, had necessitated the issuance of this Emergent Notice which, inter alia, provided that since acute scarcity conditions were prevailing in the entire State, the working of the successful Transport Contractor would be monitored for a period of ten (10) days and in the event of short supply of trucks, the work would be carried out at his cost till finalization of regular Tender Enquiry.

The Food Corporation of India (hereinafter 'FCI' for short) issued a Tender Notice inviting Technical Bids and Price Bids for appointment of Regular Transport Contractors for transportation of food grains Ex-Jammu to various centers mentioned in the tender notice under Two Bid System from financially sound parties possessing sound business competence and eligibility. This notice was published on 01.08.2006.

One hundred and five (105) tender documents were purchased by different parties. Fifty eight (58) tender documents were received before the date fixed for the purpose. A committee of officers comprising fourth to eighth respondents examined the Technical Bids and prepared comparative statements showing details of documents attached with technical bids for determining the eligibility of tenderers, who had participated in the Tender Enquiry.

M/S Hemkund Transport Service, the writ petitioner, offered its bid for two centers i.e. (i) Ex- Jammu to Lethpora; and (ii) Ex-Jammu to Kishtwar, alongwith fifty four lacs (54), as earnest money. The petitioner was not allowed to participate in the

price bid because it was found ineligible for the Technical Bid on three counts: (i) The petitioner had not indicated its PERMANENT ACCOUNT NUMBER (PAN, hereinafter for short) in the Technical Bid documents; (ii) The supplementary partnership deed introducing seventh partner in the petitioner firm, was not registered under the Jammu & Kashmir Registration Act; and (iii)

The petitioner did not possess the requisite experience and financial status.

Projecting its financial status and experience in the transportation of food grains worth more than fifty crores (50), an experience certificate of transportation of food grains till March, 2006, worth more than thirty three crores (33), and Solvency Certificate of thirty crore rupees from a Nationalized Bank had been annexed by the petitioner with the pre-qualification bid documents. The petitioner, constituted by a registered document, stood registered with the Registrar of Firms and introduction of seventh partner had necessitated the execution of a supplementary deed of partnership, which was a notarized document and information as to his introduction in the partnership too stood conveyed to Registrar of Firms, asserts the petitioner.

Grounds taken by the Petitioner

2. The petitioner questions the rejection of its Technical Bid in this writ petition on the following grounds:

i) Notice inviting tender and conditions contained in the Technical Bid particularly the experience clause was irrational, unfair and unreasonable, intended to ensure participation and qualification of only one contractor who was carrying on the work on day-to-day basis till finalization of the Tender Enquiry for the Regular contract. The conditions contained in the Technical Bid were bad because these conditions contravened the standard and guidelines issued by the Central Vigilance Commission in this behalf.

ii) The FCI had acted in bad faith so as to ease out the petitioner from the process of qualifying the technical bid on flimsy grounds. The condition of eligibility prescribed by the FCI providing experience of having undertaken a single contract of the value of not less than fifty percent (50%) of the estimated cost of the tendered work was harsh. Rejection of technical bid of the petitioner for not indicating the PAN with the tender document was unwarranted as there was no such requirement in the tender document to supply the PAN.

iii) Introduction of a partner in the existing partnership firm would not take away the status of the petitioner as a registered partnership firm. Internal arrangement of introducing seventh partner in the partnership firm was permissible and no fault could be found with the partnership, as such. Non-registration of the supplementary partnership deed cannot, in law, be treated as an impediment to assess the financial status of the petitioner to qualify the technical bid. Non-registration of the Supplementary Deed of Partnership was even otherwise inconsequential.

iv) None of the qualifiers of the technical bid i.e. Chowdhary Nagar Singh, Kashmir Road Line, Kashmir Transport Co.,Vikas Transport and Dutta Trading and Chowdhary Transport Company, possessed the requisite Rake handling work experience.

v) The process employed by the respondents for considering the eligibility of the petitioner for the Technical Bid was biased, unwarranted and unfair.

Respondents' stand in their Reply

3. The FCI says in its reply affidavit that a SoS situation had arisen when the J&K State Road Transport Corporation failed to supply the required number of trucks for execution of the transport contract for carrying food grains to the valley and other far flung areas of the State of J&K. The situation, according to the Corporation, had reached a level where it had become absolutely impossible to meet the supply of required food grains to the public. Series of meeting were held at the level of Chief Minister, Minister of Consumer Affairs and Public Distribution, and Minister for Transport. Inputs received by the intelligence bureau too confirmed the shortage of food grains in major areas of the State. The deliberations ultimately resulted in providing yet another week's time to J&K State Road Transport Corporation to improve the truck supply position to the FCI so that scarcity of food grains was avoided. Providing of this opportunity to the J&K State Road Transport Corporation, the Transport Contractor did not yield any tangible results meeting the required supply of trucks, And the situation further deteriorated. The J&K State Road Transport Corporation ultimately decided to withdraw from the contract. It was because of the emergent situation in the State regarding non-supply of food grains that the emergent notice came to be issued by the FCI.

4. The writ petition has been contested by the respondents on the following grounds:-

I. The seventh partner had been attempted to be introduced in the existing partnership on 23.08.2006, i.e. a day before the opening of the technical bid on the basis of an unregistered partnership deed, executed, before a Notary, which course was impermissible and against law rendering the introduction of the seventh partner illegal.

II. Sub-clauses (IV) and (V) of the Technical Bid required furnishing of Balance-Sheet of the firm including Profit & Loss Account for the preceding three years. The petitioner, stated to have come into being in March, 2005, had not, thus, qualified the technical bid as it could not have the details of Balance-Sheet of the firm for the preceding three years.

III. Petitioner did not satisfy the requirement of annexing with the tender document, Income-Tax PAN of the firm and that certificate for, having applied for PAN would not satisfy the requirements for qualifying the technical bid.

IV. The Solvency Certificate issued in favour of the petitioner was dubious and manipulated.

V. The financial soundness of the firm had been attempted to be indicated by the properties of the seventh partner. These properties could not be taken into consideration additionally because the seventh partner had sworn a wrong affidavit of owning these properties whereas the said properties had been indicated to be belonging to a Trust.

VI. Necessary parties have not been impleaded as party respondents to the writ petition.

Submissions

On behalf of Petitioner

5. Sh. U. K. Jalali, learned Senior Counsel appearing for the petitioner, submitted that non-registration of the supplementary deed of partnership, introducing seventh partner in the existing partnership firm, would not affect the status of the petitioner as an existing partnership firm because the firm had informed the Registrar of Firms as to the introduction of the seventh partner; And even if the registration was necessary for the supplementary deed of partnership, its non-registration would not come in the way of the status of the petitioner to compete for the tender and its eligibility for the technical bid. Reliance was placed on "Sharad Vasant Kotak and others v. Ramniklal Mohanlal Chawda and another" AIR 1998 SC 877, to support his contention.

Commenting on the requirements of technical bid in regard to Income Tax Clearance Certificate, duly audited Profit & Loss Account of preceding three years and duly audited Balance Sheet of preceding three years appearing at items eight to ten in the technical bid document, learned counsel urged that these requirements were optional and non-fulfillment of these requirements would not disqualify the petitioner. Regarding non-furnishing of the Income Tax PAN of the firm, the learned counsel submits that this was an unnecessary condition to determine the eligibility for the technical bid and would not be an impediment to determine the financial soundness and business competence of the petitioner.

On behalf of Respondents

6. Sh. M. A. Goni, learned Senior Counsel appearing for the respondents, while meeting the submissions of Sh. Jalali, urged that non-registration of the supplementary deed of partnership would not entitle S. Sudershan Singh Wazir to be a partner of the petitioner and thereby disentitled the petitioner to rely on the properties of the seventh partner to project the financial soundness of the petitioner firm. He relies on Section 17 of the Registration Act to urge that requirement of registration of any partnership deed in the State of J&K was compulsory, and omission to get the supplementary partnership deed registered under the J&K Registration Act would make the seventh partner as a non entity in the partnership firm of the petitioner. Learned counsel submits that the petitioner's financial soundness and business competence was examined by the competent authority on the basis of comparative statements which were prepared by the officers of the committee which went through all the documents of the prospective bidders so as to determine their eligibility for the technical bid. The petitioner was found to be financially unsound to qualify for the technical bid. As regards challenge of the petitioner to the eligibility condition of the technical bid, learned counsel urged that terms of the tender notice cannot be questioned by the petitioner as it was the prerogative of the Corporation to prescribe such conditions, which it considered necessary for determining the financial soundness and business competence of the bidders. The eligibility conditions prescribed in the technical bid were not justiciable and judicial review for determining the reasonableness or otherwise of the conditions was impermissible. Learned counsel relies on "Tata Cellular v. Union of India" reported as AIR 1996 SC 11; and "Laxmi Sales Corporation v M/s Bolangir Trading Company and ors" reported as 2005 (2) Supreme 183, to support his contentions.

Elaborating his submissions on the introduction of seventh partner in the partnership firm, learned counsel submits that the petitioner had manoeuvred the documents to mislead the Corporation to determine its eligibility on the basis of the property of the seventh partner who had not yet attained the status of a partner.

Learned counsel has produced the records of the Corporation to urge that the procedure adopted by the Corporation was fair and transparent, and that the petitioner had filed this petition to delay the finalization of contract with ulterior motive. A Single Bench judgment too has been relied upon by learned counsel to urge that the petitioner had no right to question the eligibility conditions of the technical bid.

7. I have examined the submissions of learned counsel for the parties, the records produced by Sh. M. A. Goni, the documents annexed by the parties with their respective pleadings and the case law cited by the learned counsel for the parties.

Questions which fall for consideration.

8. The issues which fall for consideration in this writ petition may be summarized, thus:-

(A) Was supplementary deed of partnership made on 23.08.2006 compulsory registerable, and if so, would its non-registration affect the introduction of S. Sudershan Singh Wazir as partner in the partnership?

(B) Was the action of the FCI, in holding the petitioner ineligible to compete for the price bid because of his ineligibility for the technical bid, unjustified ?

(C) Whether the Emergent Notice inviting tender dated 29.07.2006 was unwarranted?

Supplementary Deed of Partnership & Technical Bid Document

9. In order to consider the questions, which arise for determination in this petition, reference to the supplementary deed of partnership dated 23.08.2006 and eligibility condition in the Technical Bid document prescribed by the FCI, becomes necessary. The supplementary deed of partnership dated 23.08.2006 reads, thus:-

"**SUPPLEMENTARY DEED OF PARTNERSHIP**

This deed of partnership is made on this 23rd Day of August between 1. S. Narbir Singh S/o S. Kehar Singh R/o 64- Preet Nagar Jammu, 2. S. Kanchan Singh S/o Amar Singh R/o Chatha Farm, Jammu 3. S. Mohinder Singh S/o Jaswant Singh R/o 567/3 Nanak Nagar, Jammu 4. S. Kulwant Singh S/o Late S. Raghbir Singh R/o 13/1549 Nanak Nagar, Jammu 5. S. Aya Singh S/o S. Kartar Singh R/o Chatha Mill, Jammu and 6. S. Gajan Singh S/o S. Sardar Singh R/o Sainik Colony, Jammu hereinafter called the parties of the Ist., 2nd , 3rd , 4th , 5th and 6th parts respectively who are already engaged in running the Transport Business under the name and style of Hemkund Transport Service and S. Sudershan Singh Wazir S/o Late S. Rajinder Singh R/o 18-A/7 Trikuta Nagar Jammu hereinafter referred to as the party of the 7th part.

Whereas the parties of the Ist, 2nd , 3rd, 4th, 5th, and 6th part are already engaged in the Transport Business and are interested to expand their business further. They intend to include the party of the 7th part as partner in the said business with a total share component of 50% (fifty percent) out of 100% (Hundred

percent) the rest of the 50% share shall be divided equally among the parties of the 1st to 6th part.
Whereas the party of the 7th part has agreed to join hands with the parties of the 1st to 6th part and vice versa.
NOW THIS DEED OF PARTNERSHIP WITNESSETH AS UNDER:-

1. That, the business of the parties shall be run under the name and style of M/s Hemkund Transport Service.
2. That, the party of the 7th part shall be the Managing Partner and shall be entitled to a share of 50% (fifty percent) in the said business.
3. That, the partnership can be dissolved at will after giving one month notice.
4. That, this notarized deed of partnership shall be got registered with competent authority at an appropriate time.
5. That, the partnership shall commence forthwith with effect from the date it is reduced into writing.

In witness whereof all the partners from 1st to 7th part have appended their respective hands hereunder on 23rd of August 2006.

Witnesses:	Executants.
1. Sandeep Kumar S/o Lt. Sh. Sham Lal R/O 117 Purani Mandi, Jammu.	1st Party
	2ndParty
2. P. S. Aurora S/o S. Jaswant Sin R/O 232, Shastri Nagar, Jammu.	3rd Party
	4th Party
	5th Party
	6th Party
	7thParty"

The Technical Bid document reads, thus:-

"Tender N0. …… Dated : ……

FOOD CORPORATION OF INDIA

TECHNICAL BID

FINANCIAL SOUNDNESS AND BUSINESS COMPETENCY DATA OF HANDLING AND TRANSPORT CONTRACTOR FOR RAILWAY SIDING AND FCI DEPOT

(i) Terms and conditions (signed under seal)
(ii) List of documents enclosed (only as per Instructions given in Sr. No.6) Yes/No

Documents No.

1. Certified copy of Partnership deed/Articles of Association/ Memorandum of Association/Bye-laws etc. as applicable Yes/No
2. Certificate Registration Yes/No
3. Authorization letter Yes/No
4. Certificate of experience for preceeding three years Yes/No
5. Letter from the bank on credit/limits enjoyed Yes/No
6. Bank Statement for the last 6 month from banker(s) Yes/No
7. Solvency Certificate Yes/No
8. Latest Income tax clearance certificate 1
9. Duly audited P&L account of preceeding three years 1 If app- applicable
10. Duly audited Balance sheet of preceeding three years 1
11. List of trucks owned with zerox copies of R. C. Books. Yes/No

Tender No. …… Dated ……..

(iii) <u>TECHNICAL EXPERIENCE</u>

1. WORK EXPERIENCE: for preceeding three years

(Enclose experience certificate for rake handling and transportation duly obtained from Manufacturer/Handling agency/Govt. Deptt./PSU/Public Ltd. Company dealing in fertilizers, food grains cement or similar products during the preceeding three years of which the value of single contract should not be less than 50% of the estimated value of present contract (for amount please refer press advertisement with respect to corresponding centre) in any of those three years otherwise work experience will not be considered).

Document No.1

Sl. No.	Name of the Client served	Contract Period	Product handled	Volume in MT	Value of Contract Executed (Rs.)

2. Whether your firm/company is blacklisted by FCI or any other Public Sector/Govt-Qasi Organization/any other client Yes/No

3 Whether your contract was terminated before expiry of Contract Period or Security Deposit/EMD forfeited by FCI or any other public sector/Govt./Quasi-Govt. Organization/any other client.Yes/No

4. Whether proprietor/partner/Director (as applicable) has been prosecuted by any judicial court for any criminal breach of Trust Yes/No

5. **DETAILS OF SISTER CONCERNS**

(a) Name & Address
(b) Activities engaged in by Sister Concern
(c) Names, Address & Telephone No.s of Proprietors/Directors/Partners of Sister Concern.

Note:

(i) The Blacklisted parties by FCI or Govt./Quasi Govt. organization will not be qualified.
(ii) The parties whose EMD is forfeited by FCI will not be qualified.
(iii) FCI reserves the right not to consider parties having any dispute with FCI in order to protect its interest.

IV. **FINANCIAL SOUNDNESS**: **APPENDIX-II**

1. Name of bankers, Addresses & Telephone Nos.
2. Details of credit limits/Facilities enjoyed (Please give certificate from the Bank)

Tender No…….. **Date: ……**

Document No.2.

Sl. No.	Name of the Bank	Type of credit (i.e. C/C, O/D etc.)	Amount of Credit Limit sanctioned (Rs.)

3. **Details of solvency of the Firms as assessed by bank:-**

Name of the Bank	Amount of Solvency Certificate (Rs.)	Date of solvency certificate

(Please give solvency certificate from the Bank giving the amount issued not earlier then three months from the date of application.

Document No. 3.

4. Income Tax PAN Number of the Firm_____.

Document No. 4.

5. Details of Balance Sheet of the Firm for the preceeding three years.
(Please enclose copies for the preceeding three financial years duly audited)

Document No. 5.

6. Profit & Loss Account Statement for the preceeding three years.

Document No. 6.

Details of immovable property owner by Firm/Proprietor/Director/Partners.

Sl. No.	Type of Property	Identification No. with address	Owned in the name of	Present value (Rs.)

OR

DECLARATION

I/We hereby solemnly declare that I/We Proprietor/Director/Partner/Firm do not own any property.

(Signature & Seal)
(Authorized Signatory)

(Strike off whichever is not applicable)

Tender No. …… Dated …… List of Partners/Directors

Sl. No.	**Full Name of the Partner/Director**

I/We hereby solemnly declare that the Proprietor/Director/Partner of this Firm/Company mentioned at Sl. Nos. is/are common/not common (Strike off whichever is not applicable) with any other Firm/Company who has applied for pre-qualification

against same advertisement. In case of common Proprietor/Partner/Director in other firm who has also applied for pre-qualification against same advertisement. Please mention the name of Firm/Firms.

(Signature & Seal)
(Authorized Signatory)

Declaration about relationship with Employee of FCI.

I/We hereby solemnly declare that the Proprietor/one or more Partner/Directors of this firm/company has relationship/has no relationship (Strike off whichever is not applicable) with the employee of FCI.

(Signature & Seal)
(Authorized Signatory)

Declaration of membership of any Goods Transport Association.

Give details of so;

Name & Address the Association

With Telephone /Fax Nos.

I/We certify that all information furnished by me/us is correct and true and in the event that the information given is found to be incorrect/untrue, FCI shall have the right to disqualify me/us without giving any notice reason thereof.

(Signature & Seal)
(Authorized Signatory)"

10. Before considering the non-registration of supplementary deed of partnership and issues arising therefrom, few facts which are not disputed by the parties need to be noticed.

Six persons namely Narbir Singh, Kanchan Singh, Mohinder Singh, Kulwant Singh, Aya Singh and Gajan Singh, executed a partnership deed on 29.03.2005. This was registered under the Jammu & Kashmir Registration Act, 1977. Thereafter a supplementary deed of partnership came into existence indicating a contract between these six partners and one S. Sudershan Singh Wazir. This deed was executed on 23.08.2006 before a Notary at Jammu. Clause (I) of this deed records that the business of the parties shall be run under the name and style of M/S Hemkund Transport Service. Clause (II) indicates, S. Sudershan Singh Wazir to be the Managing Partner entitled to 50% share in the business. Clause (V) of this deed says that the partnership shall commence forthwith i.e. with effect from the date it was reduced into writing.

11. In order to resolve issue marked as (A) in paragraph 12, reference needs to be had to the definition of 'Partnership' contained in Section 4 of The Jammu & Kashmir State Parntership Act, 1996. This Section defines 'Partnershp' as the relationship between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Persons who have entered into partnership with one another are called individually 'partners' and collectively 'a firm', and the name under which their business is carried on is called the 'firm name'.

12. The Partnership Act, does not contemplate the execution of a deed of partnership as a pre-requisite for "a Partnership Firm" to come into existence. It does not either

require any deed of partnership to be registered. Chapter VII, however, provides for the registration of "Partnership Firm".

13. Section 58 of the Partnership Act, requires sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated, a statement in the prescribed form and accompanied by the prescribed fee, stating:-

(a) the firm name,
(b) the place or principal place of business of the firm,
(c) the names of any other places where the firm carries on business,
(d) the date when each partner joined the firm,
(e) the names in full and permanent addresses of the partners, and
(f) the duration of the firm.

This statement shall be signed by all the partners, or by their agents specially authorized in this behalf.

In case Registrar appointed under the Act is satisfied that the provisions of Section 58 had been complied with, he is required to record an entry of the statement in a Register called the Register of Firms.

14. Section 17 of the J&K Registration Act, however, contemplates compulsory registration of ANY PARTERNSHIP DEED. Affects of registration and non-registration of compulsory registerable documents are given in Section 49 of the Registration Act. These two Sections, thus, need to be noticed, which read, thus:-

> **"17. Document of which registration is compulsory**
>
> (1) The following documents shall be registered, namely:-
>
> (a) instruments of gift of immovable property;
>
> (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, to or in immovable property;
>
> (c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest;
>
> (d) any partnership deed;
>
> (e) any adoption deed;
>
> (f) any non-testamentary authority to adopt; and
>
> (g) leases of immovable property for any term exceeding one year, and reserving a yearly rent exceeding fifty rupees:
>
> Provided that the Government may, by order published in the Jammu and Kashmir Government Gazette, exempt from the operation of this sub-section any such lease executed in any district, or part of a district;
>
> (h) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, decree, assign, limit or extinguish, whether in present or in future, any right,

title or interest, whether vested or contingent, to or in immovable property.

(2) Nothing in clauses (b) and (c) of sub-section (1) applies to-

(i) any composition deed; or

(ii) any instrument relating to shares in a Joint Stock Company, notwithstanding that the assets of such Company consist in whole or in part of immovable property; or

(iii) any debenture issued by any such company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

(iv) any endorsement upon, or transfer of, any debenture issued by any such Company; or

(v) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or

(vi) any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceedings; or

(vii) any grant of immovable property by Government; or

(viii) any instrument of partition made by a revenue officer; or

(ix) any instrument relating to the loan granted under authority of Cabinet Order No.1547-C of 1953 dated 15th December, 1953;

(x) any order granting a loan under the Jammu and Kashmir Government Aid to Agriculturist and Land Improvements Act, Samvat 1993, or instrument for securing the repayment of a loan made under that Act; or

(x-a) any instrument relating to the loan granted to displaced persons for construction of houses or for petty trade;

(xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage;

(xii) any instrument which purports or operates to transfer land in favour of State or a Panchayat constituted under the Jammu and Kashmir Village Panchayat Act, 2008.

[Explanation.- A document purporting or operating to effect a contract for the sale of immovable property shall not be

deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any interest-money or of the whole or any part of the purchase-money.]"

"49. Effect of non-registration of documents required to be registered.

No document required by section 17 [or by any provision of the Transfer of Property Act] to be registered shall-

(a) **affect any immovable property comprised** therein,

(b) **confer any power to adopt, or**

(c) be received as evidence of any transaction affecting such **property** or **conferring such power**, unless it has been registered.". (emphasis supplied.)

15. Although Section 17 prescribes the compulsory registration of any partnership deed, Section 49 does not contemplate any affect of its non-registration. Non-registration of compulsory registerable document under Section 17, entails the consequences, which are mentioned at clauses (a), (b) & (c) of Section 49. This Section is completely silent as to the affect of non-registration of a partnership deed. Expressions "**such property**" and "**conferring such power**" appearing in Section 49(c), refer only to the property i.e. immovable property and power i.e. power to adopt as mentioned in Section 49(a) & (b) of the Registration Act. It, therefore, follows that the rigour of Section 17 in requiring compulsory registration of a partnership deed has been diluted with the omission of partnership deed from the purview of Section 49 of the Registration Act.

16. I am, therefore, of the view that non-registration of a partnership deed would not have any affect on the document of supplementary deed of partnership or reconstitution of partnership. 17. Even otherwise, all that the Registration Act contemplates is the registration of a **deed of partnership** and **not the registration of partnership as such** under the Registration Act. Non registration of a partnership under the Registration Act would not, thus, affect the partnership, its affairs and the rights and liabilities, which it or its partners have under the J&K State Partnership Act, 1996. Non- registration of a firm under the J&K State Partnership Act entails only those consequences, which are provided in the provisions of Section 69 of the Partnership Act. This Section does not dis-entitle, in any manner whatsoever, a non registered partnership to continue its partnership business and enter into contracts. All that Section 69 contemplates is that no suit to enforce a right arising from a contract or conferred by the Partnership Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm was registered and the person suing was or had been shown in the Register of Firms as a partner in the firm. Unregistered firm cannot sue any third party. There are certain exceptions provided to this Section also in Section 69(3)(a)(b) and (4)(a)(b).

18. Petitioner's registration with the Registrar of Firms, not being in dispute; the non registration of supplementary partnership deed under the Registration Act, would not, thus, make the petitioner ineligible to seek consideration of its eligibility for the technical bid for the contract in question. I, therefore, accept the submission of Sh. Jalali that non-

registration of petitioner's supplementary deed of partnership was inconsequential. Issue No. 8(A) is, accordingly, resolved. I will, however, comment on the affect of this finding on the issue, a little later after dealing with the submissions of learned counsel for the parties on Issue No.8(B).

19. The second question which falls for consideration is as to whether the respondents had erred in determining the eligibility of the petitioner for the technical bid. Before considering this question, some facts need to be noticed.

20. The petitioner had annexed with its technical bid, a certificate issued by Deputy General Manager (Load), J&K SRTC Ltd., Jammu, to the effect that the firm had worked with J&K SRTC Ltd., for transportation of food grains from Jammu to various locations of Jammu & Kashmir w.e.f. 30th April 2005 to 31st March 2006 and the company had transported 3132485.15 quintals of food grains and had completed the above assignment worth Rs. 33.75 Crores during this period and their work was satisfactory; a Solvency Certificate issued by Punjab & Sind Bank, certifying the solvency of the petitioner upto Rupees thirty crores (Rs.30 cr); Balance Sheet and Profit & Loss Account Statement, issued by Vinod Om & Associates, Chartered Accountants; a certificate of Simran Transport Service, placing 250 trucks at the disposal of M/S Hemkund Transport Service; and a certificate indicating valuation report in respect of land and building belonging to S. Sudershan Singh Wazir besides an affidavit of the seventh partner.

21. Respondents' Committee which examined the technical bid of the petitioner alongwith the technical bids of other persons had made the following comments:-

> "M/S Hemkund Transport Service- This is a registered private firm with the Registrar of Firms J&K. The firm has been registered with the Registrar of firms on 15-4-2005 on the basis of partnership deed registered by Sub Registrar Excise Magistrate Jammu on 13 March 2005. The authorization letter addressed to General Manager FCI J&K authorizing S. Gajan Singh partner of M/S Hemkund Transport Service seems to have intriguingly signed by seven partners without indicating their names before the signatures.
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> There is a supplementary partnership deed filed with the technical bid by virtue of which it has been shown that the firm has introduced a 7th partner on 23rd August 2006. The supplementary deed has neither been got registered before the Sub Registrar nor before the Registrar of Firms under Registration Act. Sec.63(i) of the Partnership Act provides that for any change in the constitution of the firm a notice has to be given to the Registrar for such change specifying the date thereof and the Registrar shall make a record of the notice in the record relating to the firm in the register of firms and shall file the notice alongwith the statement relating to the firm. Further a notice has also to be given to the Transport Commissioner for making any change alongwith partnership deed for verification.

Other observations on the shortcomings are as under:-

a) Income Tax return has not been submitted alongwith technical bid.

b) No PAN No. has been given and as per indication the party has applied for PAN No. on 7-8-2006.

c) Solvency Certificate issued by Bank does not indicate details of the property of Partners of M/s Hemkund Transport Service on the basis of which Solvency Certificate is issued. It is very surprising that the party is submitting Bank statement of J&K Bank Ltd whereas the Solvency Certificate is issued by Punjab & Sind Bank.

d) Perusal of Profit & Loss for the year ending 31-3-2004 show that the party has conducted a business to the tune of Rs.1.36 lac only and net profit carried to the partners is minus Rs.18,820/-. Similarly Profit & Loss for the year ending 31-3-2005 show that the party has carried out business to the extent of Rs.2,06,000/- and the net profit shared to the partners is minus Rs.19,517/-. Further Profit & Loss Account for the year 31-3-2006 indicate that the party has transacted a business to the tune of Rs.34.84 Crores and the profit sharing by the partners is to the tune of Rs.92,372/-. It may be pertinent to point out that Transport Contract awarded by FCI to SRTC during the year was sub-letted to M/S Hemkund Transport Service by SRTC and the transactions reflected in the Bank statement refers to the payments received from SRTC for disbursement to the drivers.

e) Evaluation certificate of the property indicate that two properties at Sr. No.4 belong to a trust and the evaluation certificates are not accompanied with the registration documents of the property and non-incumberance certificate."

22. The eligibility of the petitioner was examined by the respondent Corporation on the basis of observations of the Committee. The financial soundness and business competence of the petitioner appears to have been rejected mainly on the ground; (i) that Income Tax return had not been submitted with the technical bid; (ii) PAN of the firm had not been indicated by the petitioner; (iii) Solvency certificate did not indicate the details of property of the partners of the petitioner; (iv) Profit & Loss for the year ending 31.03.2004 indicated that the firm had conducted a business to the tune of Rs. 1.36 lacs only and net profit carried to the partners was **minus** Rs.18,820/-. Similarly Profit & Loss for the year ending 31.03.2005 showed the net profit of the partners as **minus** Rs.19,517/-. The profit earned by the petitioner for the year ending 31.03.2006 was Rs. 92,372/-. This profit is stated to have been earned by the firm as sub-allottee of SRTC to whom the transport contract had been awarded by the FCI. Valuation Certificate of the

property indicated two properties belonging to a Trust and the Valuation Certificate was not accompanied by the non encumbrance certificate.

23. Sh. Goni, learned Senior Counsel appearing for the FCI, while referring to expression 'Technical Expertise' appearing at item No. (III) 1, submitted that the petitioner firm, which had come into existence only in 2006 and even if, it was to be treated to have come into being in 2005 when the original deed of partnership was executed, would not have requisite "work experience" of preceding three years to be eligible to compete for the technical bid.

24. Sh. Jalali, learned Senior Counsel appearing for the petitioner, in order to meet the submission of Sh. Goni, urged that the petitioner had been dealing in the business of transport even prior to coming into being of the petitioner in the year 2005.

25. I have examined the submissions of the parties.

26. The deed of partnership initially executed between six persons, does not indicate an such case of the firm being already in the transport business before its constitution. It, on the other hand, specifically records that the parties had joined together with equal contribution to run transport business under the name and style of M/S Hemkund Transport Service with its Head Office at Yard No.2, Shop No.12, Transport Nagar Narwal, Jammu. The writ petition also does not indicate muchless support the plea raised by Sh. Jalali that the firm was in existence even prior to the execution of partnership deed dated 29.03.2005, and had the requisite work experience of three years in transportation of fertilizers, food grains, cement or similar products of which value of single contract was not less than 50% of the estimated value of the present contract.

27.

A. In the absence of anything having been placed on records by the petitioner, and the documents to the contrary indicating that the firm had initially come into existence on 29.03.2005, I am not inclined to believe that the partnership was in existence prior to 2005 and had requisite technical experience of dealing in fertilizers, food grains, cement or similar product during the preceding three years. Condition No.(i) of the Technical Bid of document No.1, therefore, had not been satisfied by the petitioner.

B. Information required to be furnished by the petitioner in document No.2 of the Technical Bid document, had not been furnished by the petitioner as the original records so indicate. Name of the Bank, Type of credit (i.e. C/C, O/D etc.) and Amount of Credit Limit sanctioned (Rs.) have also not been indicated in the Technical Bid document.

C. Petitioner-firm had not supplied the requisite Income Tax PAN of the firm as required by document No.4. The firm, as against PAN, had recorded 'Applied For'.

D. Petitioner had failed to supply details of Balance-Sheet of the firm for the preceding three years by enclosing copies of duly audited Statement of Accounts so as to satisfy the requirements of document No.5.

E. The petitioner had not supplied the documents required to be supplied in terms of document No.6 regarding Profit & Loss Account statement for preceding three years.

28. Information provided by the petitioner in the Technical Bid document, therefore, clearly demonstrates that the petitioner had failed to comply with the:-

(a) Requirement of clause (1) of document No.1 regarding technical expertise/work experience for preceding three years;
(b) Requirement of clause (2) of document No.2 regarding furnishing of name of the Bank, Type of Credit (i.e. C/C, O/D etc.);
(c) Requirement of document No.3 indicating Income Tax PAN of the Firm;
(d) Requirement of document No.4 providing Balance Sheet of the Firm for the preceding three years;
(e) Requirement of document No.5 for providing duly audited Statement of Accounts; and
(f) Requirement of document No.6 providing Profit Account Statement for the preceding three years.

29. The petitioner had not indicated anything about these shortcomings in his petition except saying that the petitioner had tendered for Rupees thirty crores and had a strong and sound financial base so as to meet the requirements contemplated by the tender for technical bid i.e. Technical Expertise and Work Experience for preceding three years. He had attempted to justify the omission to furnish the requisites needed by the documents referred to hereinabove though not specifically saying so in his petition, by projecting that the experience clause in the tender document was such, that it was difficult for any of the participants in the tender process to satisfy it.

30. I am not satisfied with this explanation of the petitioner, for the requirements prescribed in the tender documents, were mandatory and failure of any bidder to supply the requisite information would be just ground to reject its Technical Bid. These conditions of the Technical Bid document were intended to judge the technical experience and financial competence of the bidders. I am further not satisfied with the submission of Sh. Jalali that Non-supply of PAN was not fatal to the eligibility of the petitioner, for this was a statutory requirement under Section 139-A of the Income Tax Act, which would prove that the person/concern was assessed to income tax and was a bona fide assessee whose transactions were transparent and covered by the provisions of the Income Tax Act, 1961. Section 139-A of the Income Tax Act is reproduced hereunder for reference:-

"139-A. Permanent Account Number.-(1) Every person
(i) if his total income or the total income of any other person in respect of which he is assessable under this Act during any previous year exceeded the maximum amount which is not chargeable to income tax; or
(ii) carrying on any business or profession whose total sales, turnover or gross receipts are or is likely to exceed [five lakh rupees] in any previous year; or
(iii) who is required to furnish a return of income under sub-section (4-A) of Section 139,and who has not been allotted a Permanent Account Number shall, within such time, as may be prescribed, apply to the Assessing Officer for the allotment of a Permanent Account Number.

> [(1-A) Notwithstanding anything contained in sub-section (1), the Central Government may by notification in the Official Gazette, specify, any class or classes of persons by whom tax is payable under this Act or any tax or duty is payable under any other law for the time being in force including importers and exporters whether any tax is payable by them or not and such persons shall, within such time as mentioned in that notification, apply to the Assessing Officer for the allotment of a permanent account number.]
>
> (2) The Assessing Officer may also allot to any other person by whom tax is payable, a Permanent Account Number.
>
> (3) Any person, not falling under sub-section (1) or sub-section (2), may apply to the Assessing Officer for the allotment of a Permanent Account Number and, thereupon, the Assessing Officer shall allot a Permanent Account Number to such person forthwith.
>
> (4) For the purpose of allotment of permanent account numbers under the new series, the Board may, by notification in the Official Gazette, specify the date from which the persons referred to in sub-sections (1) and (2) and other persons who have been allotted permanent account numbers and residing in a place to be specified in such notification, shall, within such time as may be specified, apply to the Assessing Officer for the allotment of a Permanent Account Number under the new series and upon allotment of such Permanent Account Number to a person, the Permanent Account Number, if any, allotted to him earlier shall cease to have effect:……"

31. Perusal of Section 139-A, thus, indicates that requirement of PAN was mandatory to indicate that the petitioner was a genuine concern assessed to income tax and that its dealings and accounts could be relied upon for determining its projected case of financial soundness. I am supported in taking this view by a judgment of Hon'ble Supreme Court of India in 'Laxmi Sales Corporation v. M/s Bolangir Trading Company & Ors.' Reported as 2005 (2) Supreme 183. Paragraphs 11 & 12 of this judgment needs to be noticed and are reproduced hereunder:-

> "11. We have heard the argument of the learned counsel for the parties and perused the record. In our opinion, the High Court was not justified in coming to the conclusion that production of the documents mentioned herein above alongwith the tender form was not mandatory and the High Court was also not justified in coming to the conclusion that neither the rules and conditions governing the tender nor the advertisement calling for tender made it mandatory for an intending tenderer to produce those documents and

> specially proof of turnover for the relevant year 2001-02. We have already noticed from the various conditions in the tender form and annexures annexed thereto that production of supporting documents wherever applicable in Annxure I & J was one of the requirements of the tender and Annexure- J specifically required at Sl. No.7 the proof of turnover of the firm over the last two relevant years with supporting documents. The same annexure also required the tenderer to produce proof of work experience for the last two years with full details and supporting documents and the checklist had specifically mentioned that the production of proof of turnover with latest profit and loss account duly certified by a Chartered Accountant was a mandatory requirement.
>
> 12. In this background we are unable to accept the finding of the High Court that there was no mandatory requirement of the production of the above documents. As a matter of fact the High Court erred in coming to the conclusion in para 6 of its judgment in the writ petition that "the advertisement in Annexure-1 to the writ petition only states that for Bolangir-Bhawanipatna, a tenderer must have a turnover of Rs.25 lakhs, but it does not anywhere state that audited profit and loss account has to be submitted by a tenderer showing a turnover of Rs.25 lakhs". This finding of fact as noticed by us herein above is contrary to records and is an error apparent on face of the record."

32. Rejection of the Technical Bid of the petitioner because of its not satisfying the mandatory requirements of the Technical Bid document, as explained in para 28 of the judgment, renders him ineligible to qualify the Technical Bid. Rejection of its bid by the respondents additionally on the ground of non-registration of supplementary deed of partnership, would not, thus, affect my finding holding the petitioner ineligible for the technical bid because of its omission to furnish requisite documents as explained in para 28 of this judgment.

33. Sh. Jalali had filed an application seeking production of PAN, which is stated to have been issued to the Firm during the pendency of the proceedings in this Court. Production of this PAN during the hearing of this petition, would not cure the defect which was noticed by the FCI in the Technical Bid of the petitioner. CMP No. 864/2006 is, therefore, rejected.

34. I would, therefore, uphold the rejection of Technical Bid of the petitioner by the respondents-Corporation on the ground of his ineligibility because of non-furnishing of requisite documents in terms of the mandatory clauses of the tender document. Additional reasons assigned by the Corporation in rejecting the technical bid of the petitioner by not taking into consideration the supplementary deed of partnership on the ground of its non-registration are, however, held to be unjustified. Rejection of the

Technical Bid on this technical ground would not, however, affect the ineligibility of the petitioner because of its failure to comply the requirements of the tender bid document.

35. This takes me to consider Issue No.8(c) i.e. Whether the Emergent Notice inviting tender dated 29.07.2006 was unwarranted?

36. The grievance of the petitioner as projected in the writ petition and urged by Sh. U. K. Jalali regarding the Emergent Tender Notice is that it was hurriedly issued to accommodate the existing contractor and the conditions of the tender document were such, which could not have been complied with by anyone other than the existing contractor and the period of one day fixed in this notice was unwarranted. The petitioner had not questioned the emergent tender notice and the acceptance of bid for this emergent notice by the respondents till its technical bid for allotment of regular contract of transportation of food grains was rejected by the respondents. Petitioner has not impleaded the person, who is stated to have been allowed transport contract till regular tender was finalized, as party respondent in the present petition. It has not even questioned the emergency projected by the respondents in issuing emergent notice pending finalization of the tender inquiry for the regular contract.

37. I have gone through the records of the Corporation. This record contains sufficient material to support what is contained in the emergent tender notice and the urgency of the Corporation to make stop gap arrangement till the finalization of the tender inquiry for the regular transport contract.

38. Emergent situations are required to be dealt with by having resort to emergent measures to deal with the existing situation. In the absence of anything having been said by the petitioner in his writ petition as to the emergency projected in the emergent notice, and in view of the material of the Corporation supporting such emergency, I am of the view that the petitioner cannot question the emergent steps taken by the Corporation to tide over the emergent situation projected in the emergent notice. Petitioner having chosen not to submit its bid pursuant to the issuance of emergent notice, its omission to question the grant of limited contract to the successful bidder of the emergent notice, when the stop-gap arrangement was finalized and the non-impleading of the person stated to have been allowed to transport food grains during the tender inquiry pending finalization of regular contract of transportation, are factors which disentitle the petitioner to invoke the writ jurisdiction of the Court.

39. I, therefore, do not find that the issuance of emergent notice and action of the respondent pursuant thereto, suffers from any bias, arbitrariness or illegality. Issue No.8(C) is, accordingly, answered.

40. Although because of the ineligibility of the petitioner to compete for the Technical Bid, rest of the points raised by Sh. Jalali would not require consideration by the Court, yet I deem it proper to deal with the submissions addressed at the Bar by the learned counsel for the parties regarding other inconsequential issues. The first issue pertains to the validity or otherwise of the Technical Experience clause of the Technical Bid document.

41. The Corporation, in its wisdom, had prescribed the condition regarding 'Technical Expertise', perusal whereof, demonstrates that the same had been incorporated by the Corporation to ensure that only bona fide bidders and experts in the field compete for the price bid. I do not find this clause of the Technical Bid to suffer from any vice of arbitrariness or unreasonableness so as to attract Article 14 of the Constitution of India. I

would, therefore, like to fall in line with the view taken by this Court in OWP No. 551/2006 to hold the impugned 'Technical Expertise' clause of the Bid document valid and mandatory in character. I do not find merit in the submissions of Sh. Upinder Kr. Jalali that CVC guidelines had not been followed by the Corporation. This is so because the guidelines issued earlier by the CVC stood modified with the new guidelines of Central Vigilance Commission issued vide office order No.44/9/03 dated 04.09.2003, which gave free hand to the PSUs to float their tenders and prescribe requisite conditions on the guidelines prescribed in the order.

42. I do not find any transgression of the existing guidelines of the CVC by the FCI in prescribing the eligibility conditions. The conditions of the Technical Bid are in line with the prevailing guidelines of the Central Vigilance Commission.

43. Sh. Jalali made yet another submission that none of the contestants of the Technical Bid had any experience of Rake handling as contemplated by clause (iii) of the Tender Bid document and in that view of the matter, the whole process of evaluation of contract in the absence of requisite qualification of Rake handling was illegal.

44. I do not find any merit in the submission of Sh. Jalali that none of the contestants of the Technical Bid had requisite qualification of Rake handling because retention of words 'Rake handling' in clause (iii) appears to be inadvertent because the contract in question was regarding transportation of food grains by road and not by rail. I, therefore, find substance in the submission of Sh. M. A. Goni that the format of the Technical Bid had been devised by the Corporation so as to deal with two types of contracts; one dealing with transportation by rail and the other with transportation by road. Rake handling will not, thus, be a relevant consideration for award of contract of transportation by road. The existence of expression 'Rake handling' in the clause (iii) will, thus, be, inconsequential to consider the case of the bidders, who were to compete for the award of contract of transportation by road. This submission of Sh. Jalali too is rejected.

45. For all what has been said above, I do not find any merit in this writ petition. The writ petition is, accordingly, dismissed. With the dismissal of the writ petition, order dated 12.09.2006 shall stand vacated.